U.S. Department of Labor

Board of Alien Labor Certification Appeals
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DATE: 01/14/2000

CASE NO: 1999-INA-122

In the Matter of

LUIS ORELLANA
Employer

on behalf of

ELIZABETH SANCHEZ
Alien

Appearances: Frank E. Ronzio, Esq.
For Employer and Alien

Certifying Officer: Rebecca Marsh Day, Region IX

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Luis Orellana's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the

employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On March 1, 1995, the Employer filed a Form ETA 750 Application for Alien Employment Certification on behalf of the Alien, Elizabeth Sanchez. (AF 16-17). The job opportunity was listed as "COOK, DOMESTIC (Live Out)". (AF 16). The job duties were described as follows:

> The occupant of this position will be required to cook, season and prepare a variety of meat, fish, [and] chicken dishes including Charquican, Tamales, Burritos, [and] Sopaipillas according to prescribed recipes for family of 5 and various guests for both lunch and dinner. Will also plan menu, serve meals and then after the meals are over, clean up the dining area, kitchen, pots, pans, oven, [and] floor.

(Id.). The stated job requirements for the position, as set forth on the application, are 2 years experience in the job offered. Other special requirements are: "Personal References Required." (Id.)

The CO issued a Notice of Findings ("NOF") on October 28, 1997, proposing to deny certification. (AF 11-14). First, the CO found that the duties described by employer did not appear to constitute full-time employment in the context of employer's household, citing 20 C.F.R. 656.3. (AF 10-12). Second, the CO also found the job requirement of two years experience cooking Mexican food to be unduly restrictive and thus in violation of 20 C.F.R. 656.21(b)(2)(i)(A). Third, the CO found that the three U.S. applicants were rejected for non lawful job-related reasons.

The Employer submitted its rebuttal on November 18, 1997. (AF 5-10). The Employer provided responses to the NOF regarding the household activities related to the cooking duties of the alien, asserting that: the job constituted full-time employment; the Employer is able to place the alien on payroll; and, the job opportunity has been and is clearly open to qualified U.S. workers. (AF 5). The Employer also argued that the requirement of 2 years experience in cooking Mexican Food is essential to perform, in a reasonable manner, the job duties described by the employer and that the requirement is justified by business necessity. (AF 9). Further, the Employer asserted that two of the applicants were rejected for lawful-job related reasons in that

they had no experience in cooking Latin American dishes.[1] (AF 9-10). One applicant did respond to the Employer's contact letter.

The CO issued a Final Determination on February 25, 1998, denying certification. (AF 3-4). The CO found that the job offered did not meet the definition of full-time employment prescribed by 20 C.F.R. 656.3. The CO also found the requirement of experience cooking Mexican food to be a preference and not based on business necessity. Finally, the CO found the three applicants were rejected for other than valid, job-related reasons. (AF 4).

The Employer filed a Request for Review on March 23, 1998. (AF 1-2). A Brief in Support of Application for Labor Certification was submitted by the Employer on February 12, 1999.

Discussion

In *Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (*en banc*), the Board held that:

> the definition of employment in section 656.3 cannot be used to attack the employer's need for the position by questioning the hours in which a worker will actually be engaged in work-related duties. Focusing solely on whether the employment will keep the worker substantially engaged throughout the day casts the problem in the wrong light--the true issue being whether the employer has a *bona fide* job opportunity.

Slip. op. at 4 (footnote omitted). Rather, a CO may correctly apply the *bona fide* job opportunity analysis of 20 C.F.R. § 656.20(c)(8) when it appears that the job was misclassified as a skilled domestic cook rather than some other unskilled domestic service position, or where it appears that the job was created for the purpose of promoting immigration. *See Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). *See also Elain Bunzel*, 1997-INA-304 (Mar. 3, 1999) (*en banc*).

Nevertheless, Employer's failure to provide adequate documentation rebutting the CO's finding of an unduly restrictive requirement pursuant to 20 C.F.R. § 656.21(b)(2)(i)(A) is without justification. The CO found the requirement of two years experience cooking Mexican food to be unduly restrictive.

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. Unduly restrictive requirements are prohibited because they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. *Venture International Associates*, 87-INA-569 (Jan. 13, 1989) (*en banc*). An employer must document the "business necessity" of a particular restrictive requirement. To establish business necessity under section 656.21(b)(2)(i), "an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the Employer's business and are essential to perform, in a reasonable manner, the job duties as described by the Employer." *Information Industries, Inc.*, 88-INA-82 (Feb. 8, 1989) (*en banc*).

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[1]The Employer uses the term Latin American dishes to include "only Mexican dishes." (AF 9).

In the instant case, the specific violation listed by the CO was the Employer's requirement that applicants for the position have 2 years experience cooking Mexican food. The Employer cites to case of *Teresita Tecson*, 94-INA-14 (May 30, 1995), for the proposition that the requirement that applicants have experience in cooking Mexican food does bear a reasonable relationship to the occupation of cook where the business is the operation of a household. In *Teresita Tecson*, the Board stated that: "The context of the business is that the family is from the Philippines and only wish to eat their native food. Thus, the job requirement in this case [of 3 months experience in cooking Filipino food] does appear to bear a reasonable relationship to the occupation in the context set forth above." The Employer neglected to discuss, however, that the Board in *Teresita Tecson* affirmed the denial of labor certification with regard to the second element in the business necessity test. The Board held that:

> The second element, however, which requires that the evidence establish that the requirement of three months experience in Filipino cooking is essential for the performance of the job duties, has not been met. ... [T]he cases involving live in workers, child monitors, and other domestic workers in which a showing of business necessity has been required are abundant. To be specific, the standard was applied in the case of Antonio & Rosario Villacorta, 88-INA-511 (November 1, 1990), in which an employer sought certification of a domestic worker who ... was required to prepare lunch and dinner ... in both American and Filipino style. In Villacorta, the Panel concluded that the requirement was unduly restrictive because the Employer failed to submit any evidence to show that an applicant who could not cook Filipino dishes could not perform the listed job duties and because the Employer has indicated that the requirement was "not a must."

It is true that the Employer in this case, in contrast to the employer in *Villacorta*, did not concede that the cooking skill is "not a must," however, it is also true that this Employer, like the Employer in *Teresita Tecson*, failed to submit evidence to show that an applicant with no prior experience in Mexican cooking is incapable of preparing Mexican food. In the NOF, the CO explained that the Employer must justify the requirement based on business necessity. The Employer responded that "[t]he Employer's, [sic] family members, relatives and other associates are from Mexico and unambiguously prefer to eat their native Mexican food." (AF 7). The Employer has failed provide evidence to support that an applicant with two years of cooking experience could not readily adapt to a Mexican style of cooking and also failed to document why the Employer, or anyone else in her family, cannot provide written recipes of Mexican dishes and perhaps provide some verbal assistance.

In this case, Employer has done no more than make unsubstantiated assertions that the experience requirement is essential for the performance of the job duties. In order to demonstrate business necessity an employer must show factual support or a compelling explanation. *ERF. Inc.*, 89-INA-105 (Feb. 14, 1990). Unsupported conclusions are insufficient to demonstrate that the job requirements are supported by business necessity. *See generally, Our Lady of Guadalupe School*, 88-INA-313 (June 2, 1989); *Inter-World Immigration Service*, 89-INA-490 (Sept. 1, 1989), citing *Tri-P's Corp., dba Jack-In-The-Box*, 87-INA-686 (Feb. 17, 1989).

Accordingly, we find the CO's denial of certification was proper.

Order

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California